

AMENDED IN SENATE JULY 2, 2003
AMENDED IN ASSEMBLY MAY 20, 2003
AMENDED IN ASSEMBLY MAY 13, 2003
AMENDED IN ASSEMBLY APRIL 30, 2003
AMENDED IN ASSEMBLY APRIL 10, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 1143

Introduced by Assembly Member Simitian

February 21, 2003

An act to amend Section 1985.3 of the Code of Civil Procedure, relating to Internet communications.

LEGISLATIVE COUNSEL'S DIGEST

AB 1143, as amended, Simitian. Civil procedure: Internet communications.

Existing law establishes the procedures by which a party may seek to produce personal records maintained by certain professionals and business entities in a civil action, as specified.

This bill would establish new procedures for the production by an ~~Internet interactive computer service provider or of online community host of identifying consumer information regarding a consumer~~, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1985.3 of the Code of Civil Procedure is amended to read:

1985.3. (a) For purposes of this section, the following definitions apply:

(1) “Personal records” means the original, any copy of books, documents, other writings, or electronic data pertaining to a consumer or, in the case of an online subpoena, ~~identifying online consumer~~ information, and which are maintained by any “witness” who is a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust company, anyone authorized by this state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code, telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, psychotherapist, as defined in Section 1010 of the Evidence Code, a private or public preschool, elementary school, secondary school, or postsecondary school as described in Section 76244 of the Education Code, or an ~~Internet service provider or online community host~~. *interactive computer service*.

(2) “Consumer” means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary.

(3) “Subpoenaing party” means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding pursuant to this code, but shall not include the state or local agencies described in Section 7465 of the

1 Government Code, or any entity provided for under Article VI of
2 the California Constitution in any proceeding maintained before
3 an adjudicative body of that entity pursuant to Chapter 4
4 (commencing with Section 6000) of Division 3 of the Business and
5 Professions Code.

6 (4) “Deposition officer” means a person who meets the
7 qualifications specified in paragraph (3) of subdivision (d) of
8 Section 2020.

9 (5) “Online subpoena” means a subpoena issued by the
10 subpoenaing party to compel an Internet service provider or online
11 community host to release identifying information of the
12 consumer.

13 (6) “Identifying information” includes the following
14 information regarding a consumer:

15 (A) A first or last name.

16 (B) A pseudonym.

17 (C) A home or other physical address, including street name or
18 name of a city or town.

19 (D) An e-mail address.

20 (E) A telephone number.

21 (F) A social security number.

22 (G) A birth date.

23 (H) An Internet protocol (IP) address.

24 (I) Any other identifier or combination of information that
25 permits the physical or online contacting of a specific individual.

26 (7) “Internet service provider” means an entity offering the
27 transmission, routing, or providing of connections for digital
28 online communications, including, but not limited to, providers of
29 online services and network access, or the operator of those
30 facilities.

31 (8) “Online community host” means the owner, moderator, or
32 operator of an online discussion forum.

33 (9) subpoenaing party to compel an interactive computer
34 service to release online information of the consumer.

35 (6) “Online information of the consumer” includes any or all
36 of the following information regarding a consumer:

37 (A) A first and last name.

38 (B) A pseudonym.

39 (C) A home or other physical address, including street name or
40 name of a city or town.

1 (D) An e-mail address.

2 (E) A telephone number.

3 (F) A social security number.

4 (G) An Internet protocol (IP) address.

5 (H) Any other identifier or combination of information that
6 allows for the identification of a consumer.

7 (7) The term “interactive computer service” means any
8 information service, system, or access software provider that
9 provides or enables computer access by multiple users to a
10 computer service, specifically including a service or system that
11 provides access to the Internet and similar systems operated or
12 services offered by libraries or educational institutions.

13 (8) “Online discussion forum” means an online bulletin board,
14 online newsgroup, chat room, Internet Relay Channel, message
15 board, listserv, discussion board, or other online discussion form.

16 ~~(10)~~

17 (9) “Public posting” is a message or comment sent, posted, or
18 contributed to an online discussion forum and made available
19 through the online discussion forum to the general public or a
20 segment of the general public.

21 (b) Prior to the date called for in the subpoena duces tecum for
22 the production of personal records, the subpoenaing party shall
23 serve or cause to be served on the consumer whose records are
24 being sought a copy of the subpoena duces tecum, of the affidavit
25 supporting the issuance of the subpoena, if any, and of the notice
26 described in subdivision (e), or in the case of an online subpoena,
27 served as provided in ~~paragraphs~~ subdivisions (c) and (d), and
28 proof of service as indicated in paragraph (1) of subdivision (c).
29 This service shall be made as follows:

30 ~~(1) To the consumer personally, or at his or her last known~~
31 ~~address, or in accordance with Chapter 5 (commencing with~~
32 ~~Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his~~
33 ~~or her attorney of record. If the consumer is a minor, service shall~~
34 ~~be made on the minor’s parent, guardian, conservator, or similar~~
35 ~~fiduciary, or if one of them cannot be located with reasonable~~
36 ~~diligence, then service shall be made on any person having the care~~
37 ~~or control of the minor or with whom the minor resides or by whom~~
38 ~~the minor is employed, and on the minor if the minor is at least 12~~
39 ~~years of age.~~

1 ~~(2) Not less than 10 days prior to the date for production~~
2 ~~specified in the subpoena duces tecum, plus the additional time~~
3 ~~provided by Section 1013 if service is by mail.~~

4 ~~(3) At least five days prior to service upon the custodian of the~~
5 ~~records, plus the additional time provided by Section 1013 if~~
6 ~~service is by mail.~~

7 ~~(c) In the case of an online subpoena, service shall be made as~~
8 ~~follows:~~

9 ~~(1) Upon the Internet service provider or online community~~
10 ~~host from whom identifying information is sought.~~

11 ~~(2) At least 44 days prior to the date for production.~~

12 ~~(3) With payment sufficient to cover postage for the Internet~~
13 ~~service provider or online community host to mail one copy of the~~
14 ~~served materials to the consumer, via first class mail, return~~
15 ~~receipt requested.~~

16 ~~(4) In electronic and paper form.~~

17 ~~(5) One electronic declaration and two paper copies of the~~
18 ~~declaration containing the following information, of which the~~
19 ~~Internet service provider or online community host has no duty to~~
20 ~~review the sufficiency thereof:~~

21 ~~(A) The communications that are the subject of the action, the~~
22 ~~subpoena, or both.~~

23 ~~(B) A statement of the cause of action.~~

24 ~~(C) How or in what manner the identity of the consumer is~~
25 ~~directly relevant to a core claim or defense.~~

26 ~~(D) A statement that other reasonable efforts to identify the~~
27 ~~anonymous communicator have proven fruitless, that the~~
28 ~~subpoena is issued in good faith and not for an improper purpose,~~
29 ~~and that the Internet service provider or online community host to~~
30 ~~whom the subpoena is addressed is likely to have responsive~~
31 ~~information.~~

32 ~~(E) The name of all courts in which complaints or motions~~
33 ~~relating to this subpoena have been filed and all corresponding~~
34 ~~case numbers.~~

35 ~~(F) The following notices:~~
36

1 ~~NOTICE TO INTERNET SERVICE PROVIDER OR ONLINE~~
2 ~~COMMUNITY HOST~~
3
4 ~~WITHIN 14 DAYS AFTER RECEIPT OF THIS SUBPOENA~~
5 ~~CALLING FOR IDENTIFYING INFORMATION OF A~~
6 ~~CONSUMER, YOU ARE REQUIRED BY SECTION 1985.3 OF~~
7 ~~THE CODE OF CIVIL PROCEDURE TO MAIL ONE COPY OF~~
8 ~~THE SUBPOENA AND ATTACHED SUPPLEMENTAL~~
9 ~~MATERIALS, BY REGISTERED MAIL, RETURN RECEIPT~~
10 ~~REQUESTED, TO THE CONSUMER WHOSE IDENTIFYING~~
11 ~~INFORMATION IS THE SUBJECT OF THE SUBPOENA, IF~~
12 ~~YOU HAVE THE CONSUMER'S MAILING ADDRESS ON~~
13 ~~FILE. A COPY OF THE SUBPOENA AND SUPPLEMENTAL~~
14 ~~MATERIALS IS PROVIDED, ALONG WITH PAYMENT FOR~~
15 ~~POSTAGE. YOU MUST ALSO NOTIFY THE CONSUMER~~
16 ~~VIA E-MAIL, IF YOU HAVE THE CONSUMER'S E-MAIL~~
17 ~~ADDRESS ON FILE. IF NEITHER MAILING NOR E-MAIL~~
18 ~~ADDRESS IS ON FILE FOR THE CONSUMER, YOU OR THE~~
19 ~~SUBPOENAING PARTY MAY, AT YOUR DISCRETION,~~
20 ~~POST A NOTICE ON THE ONLINE BULLETIN BOARD~~
21 ~~WHERE THE PUBLIC POSTING OCCURRED. AT ANY TIME~~
22 ~~PRIOR TO THE DATE ON WHICH DISCLOSURE IS~~
23 ~~SOUGHT YOU MAY, BUT ARE NOT REQUIRED TO, FILE A~~
24 ~~WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION~~
25 ~~FOR A PROTECTIVE ORDER TO PREVENT OR REGULATE~~
26 ~~THE DISCLOSURE. COPIES OF ANY OBJECTION OR~~
27 ~~MOTION SHALL BE SERVED UPON THE PARTY~~
28 ~~INITIATING THE SUBPOENA, IF YOU HAVE THE~~
29 ~~ADDRESS, AND UPON THE CONSUMER WHOSE~~
30 ~~IDENTIFYING INFORMATION IS SOUGHT.~~
31 ~~IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA,~~
32 ~~YOU MUST ALLOW TIME FOR THE CONSUMER TO FILE~~
33 ~~HIS OR HER OWN OBJECTION. THEREFORE, YOU MUST~~
34 ~~NOT RESPOND TO THE SUBPOENA ANY EARLIER THAN~~
35 ~~THE DATE ON WHICH DISCLOSURE IS DUE, AND IN NO~~
36 ~~EVENT SOONER THAN 40 DAYS AFTER THE SUBPOENA~~
37 ~~WAS PROPERLY SERVED UPON YOU ABSENT A COURT~~
38 ~~ORDER DIRECTING YOU OTHERWISE.~~
39 ~~IF YOU RECEIVE NOTICE THAT THE CONSUMER OR~~
40 ~~ANOTHER AFFECTED PARTY HAS FILED A WRITTEN~~

~~OBJECTION, MOTION TO QUASH, OR MOTION FOR A
PROTECTIVE ORDER REGARDING THE SUBPOENA, OR
IF YOU FILE A WRITTEN OBJECTION, MOTION TO
QUASH, OR MOTION FOR A PROTECTIVE ORDER,
DISCLOSURE PURSUANT TO THE SUBPOENA MAY NOT
BE MADE EXCEPT PURSUANT TO AN ORDER OF THE
COURT.~~

~~NOTICE TO CONSUMER~~

~~THE ATTACHED PAPERS MEAN THAT (INSERT NAME OF
SUBPOENAING PARTY) HAS ISSUED A SUBPOENA ON
(INSERT NAME OF INTERNET SERVICE PROVIDER OR
ONLINE COMMUNITY HOST) REQUIRING PRODUCTION
OF INFORMATION REGARDING YOUR IDENTITY. YOU
HAVE THE RIGHT TO FILE A DETAILED WRITTEN
OBJECTION, MOTION TO QUASH THE SUBPOENA, OR
MOTION FOR A PROTECTIVE ORDER. YOU MAY ELECT
TO CONTACT AN ATTORNEY TO REPRESENT YOUR
INTERESTS. UNLESS A WRITTEN OBJECTION, MOTION
TO QUASH, OR MOTION FOR A PROTECTIVE ORDER IS
FILED IN ACCORDANCE WITH SECTION 1987.1 OF THE
CODE OF CIVIL PROCEDURE, THE INTERNET SERVICE
PROVIDER OR ONLINE COMMUNITY HOST WILL BE
REQUIRED BY LAW TO RESPOND BY PROVIDING THE
REQUIRED INFORMATION. IF YOU CHOOSE TO FILE A
MOTION UNDER SECTION 1987.1, YOU SHOULD FILE IT
AT LEAST FIVE BUSINESS DAYS BEFORE THE DATE ON
WHICH DISCLOSURE IS DUE (LISTED IN THE
SUBPOENA) AND AT THE SAME TIME SERVE A COPY OF
THAT OBJECTION OR MOTION UPON BOTH YOUR
INTERNET SERVICE PROVIDER OR ONLINE
COMMUNITY HOST AND SUBPOENAING PARTY.
IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN
WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY
FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR
MOTION FOR A PROTECTIVE ORDER. YOU MAY USE THE
FORM BELOW:~~

~~(Name of Court Listed on Subpoena)~~

~~(Name of Party Seeking Information)~~

1 ~~(Case No. _____)~~

2
3 ~~SAMPLE OBJECTION TO SUBPOENA DUCES TECUM~~

4
5 ~~I object to the Subpoena Duces Tecum addressed to _____ for the~~
6 ~~following reasons:~~

7 ~~(Set forth, in detail, all reasons why the subpoena should not be~~
8 ~~complied with, including, but not limited to, the following: (1)~~
9 ~~Whether the subpoena fails to allow a reasonable time for~~
10 ~~compliance, and (2) whether the subpoena fails to comply with the~~
11 ~~requirements of subdivision (c) or (d) of SECTION 1985.3.).~~

12 ~~(Name and address of Internet service provider or online~~
13 ~~community host).~~

14 ~~(Enter e-mail nickname, pseudonym, or other alias used to~~
15 ~~whom the subpoena is addressed).~~

16
17 ~~(d) In the case of an online subpoena, within 14 days after~~
18 ~~receipt of the subpoena and materials required in subdivision (c),~~
19 ~~the Internet service provider or online community host shall~~
20 ~~provide notice to the consumer as follows:~~

21 ~~(1) If an e-mail address is on file with the Internet service~~
22 ~~provider or online community host, an e-mail shall be dispatched~~
23 ~~to the consumer stating that the subpoena has been received and~~
24 ~~enclosing or attaching the subpoena and materials required in~~
25 ~~subdivision (c).~~

26 ~~(2) If the e-mail address bounces and a mailing address is on~~
27 ~~file with the Internet service provider and that provider bills the~~
28 ~~consumer for services, one copy of the subpoena and materials~~
29 ~~required by subdivision (c) shall be dispatched by certified or~~
30 ~~registered mail or commercial delivery service, return receipt~~
31 ~~requested, to the consumer.~~

32 ~~(3) If the basis for seeking the identifying information relates~~
33 ~~to a public posting on an online discussion forum identified by the~~
34 ~~subpoenaing party under paragraph (5) of subdivision (c), and if~~
35 ~~neither the e-mail address nor mailing address is on file, the~~
36 ~~Internet service provider described in paragraph (2) receives~~
37 ~~notice that both the onfile e-mail and onfile mailing address are~~
38 ~~incorrect or out of date, such as via a returned mailing or bounced~~
39 ~~e-mail, or the Internet service provider or online community host~~
40 ~~described in paragraph (1) receives notice that the onfile e-mail~~

address is incorrect or out-of-date, such as via a bounced e-mail, then the Internet service provider or online community host shall do either of the following:

(A) Post on the online bulletin board where the posting was made the subpoena and materials in subdivision (c).

(B) Notify the subpoenaing party that the conditions contained in paragraph (3) have been met and that the subpoenaing party must now post the subpoena and materials in subdivision (c) on the online bulletin board where the posting was made. If the Internet service provider or online community host chooses to use this provision, it shall provide the subpoenaing party with access to make the posting, as needed, which shall be at the same cost governing others seeking to post.

(c) In the case of an online subpoena, the Internet service provider or online community host from whom information has been subpoenaed shall bill the subpoenaing party for the reasonably necessary and directly incurred costs associated with searching for, assembling, reproducing, or otherwise providing the records or notice required under this section. These reimbursable costs shall include any costs incurred due to the necessary disruption of normal operations while complying with the subpoena. The subpoenaing party shall pay the bill in full within 30 days of receipt. The subpoenaing party may make a motion to the court to reduce these fees.

(1) If the subpoenaing party has an e-mail address but no postal address for the consumer, the subpoenaing party shall e-mail a copy of the subpoena duces tecum and the declaration required under paragraph (3) to the consumer not less than 30 days prior to the date of production. If the subpoenaing party has a postal address for the consumer, the subpoenaing party shall mail a copy of the subpoena duces tecum and the declaration required under paragraph (3), to the consumer personally, or at his or her last known address, or serve them in accordance with Chapter 5 (commencing with Section 1010) of Title 14 of Part 2, not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided by Section 1013 if service is by mail, and at least five days prior to service upon the interactive computer service of the online consumer information. If the subpoenaing party receives notice of a delivery failure, such as via a returned mailing or bounced e-mail after attempting

1 service under paragraph (2), the subpoenaing party shall issue an
2 amended date for response to reflect the requirement therein of 44
3 days notice.

4 (2) If the subpoenaing party has neither an e-mail nor postal
5 address for the consumer, or if the subpoenaing party receives
6 notice of a delivery failure, such as via a returned mailing or
7 bounced e-mail after attempting service as required under
8 paragraph (1), the subpoena and declaration required under
9 paragraph (3) shall be served upon the interactive computer
10 service from whom online consumer information is sought, along
11 with a declaration, under oath, alleging that service under
12 paragraph (1) is not possible or has failed, the interactive
13 computer service shall execute service on the interactive computer
14 service, as follows:

15 (A) Not less than 44 days prior to the date for production.

16 (B) Two paper copies of the subpoena, two paper copies of the
17 declaration required under paragraph (3), and an electronic copy
18 of that declaration on a CD-ROM or in another electronic format
19 as directed by the interactive computer service.

20 (C) With payment sufficient to cover postage for the interactive
21 computer service to mail one copy of the subpoena and declaration
22 to the consumer, via first-class mail, return receipt requested.

23 (3) A declaration, without attachments or exhibits, shall be
24 served pursuant to paragraphs (1) and (2), containing all the
25 following information:

26 (A) The communications that are the subject of the action, the
27 subpoena, or both; and whether the communications are available
28 as public posting information together with directions reasonably
29 sufficient to locate them.

30 (B) A statement of the cause of action.

31 (C) How or in what manner the online consumer information
32 is directly relevant to a core claim or defense.

33 (D) A statement that other reasonable efforts to identify the
34 anonymous communicator have proven fruitless, that the
35 subpoena is issued in good faith and not for an improper purpose,
36 and that the interactive computer service to whom the subpoena is
37 addressed is likely to have responsive information.

38 (E) The name of all courts in which complaints or motions
39 relating to this subpoena have been filed and all corresponding
40 case numbers.

1 (F) *The date of production.*

2 (G) *The following notices:*

3 *If served on the consumer under paragraph (1), the “NOTICE*
4 *TO CONSUMER.” If served on an interactive computer service*
5 *under paragraph (2), the “NOTICE TO THE INTERACTIVE*
6 *COMPUTER SERVICE” and the “NOTICE TO CONSUMER.”*

7 (i) *“NOTICE TO CONSUMER:*

8 *“THE ENCLOSED OR ATTACHED DECLARATION MEANS*
9 *THAT (insert name of subpoenaing party) HAS ISSUED A*
10 *SUBPOENA ON (insert name of interactive computer service)*
11 *REQUIRING PRODUCTION OF INFORMATION*
12 *REGARDING YOUR IDENTITY. YOU HAVE THE RIGHT TO*
13 *FILE, WITH (insert name of court), A WRITTEN OBJECTION,*
14 *MOTION TO QUASH THE SUBPOENA, MOTION FOR A*
15 *PROTECTIVE ORDER, OR OTHER MOTION TO PREVENT,*
16 *LIMIT, OR STAY THIS DISCLOSURE. BY FILING WITH (insert*
17 *name of court), YOU SUBMIT YOURSELF TO THE COURT’S*
18 *JURISDICTION. YOU MAY ELECT TO CONTACT AN*
19 *ATTORNEY TO REPRESENT YOUR INTERESTS. UNLESS A*
20 *WRITTEN OBJECTION, MOTION TO QUASH, MOTION FOR*
21 *A PROTECTIVE ORDER, OR OTHER MOTION TO PREVENT,*
22 *LIMIT, OR STAY THIS DISCLOSURE IS FILED, THE (insert*
23 *name of interactive computer service) WILL BE REQUIRED BY*
24 *LAW TO DISCLOSE THE REQUIRED INFORMATION. IF YOU*
25 *CHOOSE TO FILE SUCH A MOTION, YOU SHOULD FILE IT*
26 *AT LEAST FIVE BUSINESS DAYS BEFORE THE DATE OF*
27 *PRODUCTION (CONTAINED IN THE SUBPOENA AND*
28 *DECLARATION) AND SERVE A COPY OF IT UPON BOTH*
29 *(insert name of interactive computer service) AND (insert name of*
30 *subpoenaing party). “*

31 (ii) *“NOTICE TO INTERACTIVE COMPUTER SERVICE:*

32 *WITHIN 14 DAYS AFTER RECEIPT OF THIS SUBPOENA*
33 *CALLING FOR ONLINE CONSUMER INFORMATION, YOU*
34 *ARE REQUIRED BY SECTION 1985.3 OF THE CODE OF*
35 *CIVIL PROCEDURE TO SERVE ONE COPY OF THE*
36 *DECLARATION, AND IN SOME CASES THE SUBPOENA, ON*
37 *THE CONSUMER WHOSE INFORMATION IS SOUGHT. A*
38 *COPY OF THE DECLARATION IS PROVIDED BOTH IN*
39 *PAPER AND DIGITAL FORM, ALONG WITH PAYMENT FOR*
40 *POSTAGE. AT ANY TIME PRIOR TO THE DATE OF*

1 *PRODUCTION, YOU MAY, BUT ARE NOT REQUIRED TO,*
2 *FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR*
3 *MOTION FOR A PROTECTIVE ORDER TO PREVENT OR*
4 *REGULATE THE DISCLOSURE. THE CONSUMER HAS THE*
5 *RIGHT TO FILE HIS OR HER OWN OBJECTION. YOU MAY*
6 *NOT DISCLOSE THE ONLINE CONSUMER INFORMATION*
7 *ANY EARLIER THAN THE DATE OF PRODUCTION, AND IN*
8 *NO EVENT SOONER THAN 44 DAYS AFTER THE SUBPOENA*
9 *WAS PROPERLY SERVED UPON YOU, ABSENT A COURT*
10 *ORDER DIRECTING YOU OTHERWISE OR WRITTEN*
11 *NOTICE OF AN AGREEMENT BETWEEN THE*
12 *SUBPOENAING PARTY AND THE CONSUMER. IF YOU*
13 *RECEIVE NOTICE THAT THE CONSUMER OR ANOTHER*
14 *AFFECTED PARTY HAS FILED A WRITTEN OBJECTION,*
15 *MOTION TO QUASH, MOTION FOR A PROTECTIVE ORDER,*
16 *OR OTHER MOTION TO PREVENT, LIMIT, OR STAY THIS*
17 *DISCLOSURE, OR IF YOU FILE A MOTION TO QUASH,*
18 *MOTION FOR A PROTECTIVE ORDER, OR OTHER MOTION,*
19 *PRODUCTION MAY NOT BE MADE EXCEPT PURSUANT TO*
20 *AN ORDER OF THE COURT.”*

21 *(4) The interactive computer service has no duty to review the*
22 *sufficiency of the declaration or any information provided by, or*
23 *actions taken by, the subpoenaing party.*

24 *(5) If contacted by the consumer or his or attorney, the*
25 *subpoenaing party shall provide copies of the subpoena and*
26 *declaration within two calendar days.*

27 *(d) In the case of an online subpoena served upon an interactive*
28 *computer service under paragraph (2) of subdivision (c), the*
29 *interactive computer service shall provide the declaration to the*
30 *consumer no more than 14 days after receipt of the subpoena and*
31 *declaration required in paragraph (3) of subdivision (c), as*
32 *follows:*

33 *(1) If the consumer is a paid subscriber and a mailing address*
34 *is on file with the interactive computer service, one copy of the*
35 *declaration and subpoena required under paragraph (3) of*
36 *subdivision (c) shall be dispatched by registered mail or*
37 *commercial delivery service, return receipt requested, to the*
38 *consumer.*

39 *(2) If the consumer is not a paid subscriber, or is a paid*
40 *subscriber and no mailing address is on file, and an e-mail address*

1 *is on file with the interactive computer service, an e-mail shall be*
 2 *dispatched to the consumer stating that the subpoena has been*
 3 *received and enclosing or attaching the declaration required*
 4 *under paragraph (3) of subdivision (c).*

5 *(3) If the basis for seeking online consumer information relates*
 6 *to a public posting on an online discussion forum identified by the*
 7 *subpoenaing party under subparagraph (A) of paragraph (3) of*
 8 *subdivision (c), and if neither the e-mail address nor mailing*
 9 *address of the consumer is on file, then the interactive computer*
 10 *service shall do either of the following:*

11 *(A) Post on the online community host identified in paragraph*
 12 *(3) of subdivision (c) the declaration provided by the subpoenaing*
 13 *party under paragraph (3) of subdivision (c) and the Notice to*
 14 *Consumers contained in paragraph (2) of subdivision (c).*

15 *(B) Notify the subpoenaing party that the conditions contained*
 16 *in this paragraph have been met and that the subpoenaing party*
 17 *is now required to post the declaration required under paragraph*
 18 *(3) of subdivision (c) and the Notice to Consumers on the online*
 19 *bulletin board where the posting was made. If the interactive*
 20 *computer service chooses to use this provision, it shall provide the*
 21 *subpoenaing party with access to make the posting, as needed, at*
 22 *the same cost governing others seeking to post information.*

23 *(e) In the case of an online subpoena, the interactive computer*
 24 *service from whom online consumer information is subpoenaed,*
 25 *shall bill the subpoenaing party for the reasonably necessary and*
 26 *directly incurred costs associated with searching for, assembling,*
 27 *reproducing, or otherwise providing the records or notice required*
 28 *under this section. These reimbursable costs shall include any*
 29 *costs caused by the unavoidable disruption of normal operations*
 30 *while complying with the subpoena. The subpoenaing party shall*
 31 *pay the bill in full within 30 days of receipt, or make a motion to*
 32 *the court to reduce the costs payable based on the*
 33 *unreasonableness of the costs claimed. The interactive computer*
 34 *service may make a motion to the court to compel the payment of*
 35 *any costs provided for in this subdivision; and shall be entitled to*
 36 *recover reasonable attorney's fees and costs from the subpoenaing*
 37 *party if it prevails in that motion.*

38 *(f) Prior to the production of the records, the subpoenaing party*
 39 *shall do either of the following, or in the case of an online*
 40 *subpoena, follow the procedure under subdivisions (c) and (d):*

(1) Serve or cause to be served upon the witness a proof of personal service or of service by mail attesting to compliance with subdivision (b).

(2) Furnish the witness a written authorization to release the records signed by the consumer or by his or her attorney of record. The witness may presume that any attorney purporting to sign the authorization on behalf of the consumer acted with the consent of the consumer, and that any objection to release of records is waived.

(g) A subpoena duces tecum for the production of personal records shall be served in sufficient time to allow the witness a reasonable time, as provided in paragraph (1) of subdivision (d) of Section 2020, to locate and produce the records or copies thereof.

(h) Every copy of the subpoena duces tecum and affidavit, if any, served on a consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court or serve a written objection as provided in subdivision (i) prior to the date specified for production on the subpoena; and (3) if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or her rights of privacy. If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by this subdivision.

(i) A subpoena duces tecum for personal records maintained by a telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, shall not be valid or effective unless it includes a consent to release, signed by the consumer whose records are requested, as required by Section 2891 of the Public Utilities Code.

(j) Any consumer whose personal records or ~~identifying~~ *online consumer* information are sought by a subpoena duces tecum and who is a party to the civil action in which this subpoena duces tecum is served may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum *or other motion that stays discovery*. Notice of the

bringing of that motion shall be given to the witness and deposition officer *or interactive computer service* at least five days prior to the date for production. ~~The failure to provide notice to the deposition officer shall not invalidate the motion to quash or modify the subpoena duces tecum but may be raised by the deposition officer as an affirmative defense in any action for liability for improper release of records.~~

~~Any other consumer or nonparty whose personal records or identifying information are sought by a subpoena duces tecum may, prior to the date of production, serve on the subpoenaing party, the witness, and the deposition officer, a written objection that cites the specific grounds on which production of the personal records should be prohibited.~~

~~No witness or deposition officer shall be required to produce personal records or identifying information after receipt of notice that the motion has been brought by consumer, or after receipt of a written objection from a nonparty consumer, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected.~~

~~The party requesting a consumer's personal records or identifying information may bring a motion under Section 1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the personal records and the consumer or the consumer's attorney.~~

~~(k) When considering a written objection, motion to quash, or motion for a protective order to prohibit the disclosure of identifying information in the case of an online subpoena, the court shall examine whether the subpoenaing party and the Internet service provider or online community host have substantially complied with the requirements set forth in this chapter and all of the following factors as reflected in the pleadings as well as the evidence submitted by any party to the proceeding:~~

- ~~(1) The First Amendment rights of the anonymous speaker.~~
- ~~(2) The probability that the plaintiff will prevail on the claim.~~
- ~~(3) The necessity for disclosure of the consumer's identity. If the court determines that these elements weigh in favor of the consumer, the court shall quash the subpoena. A prevailing Internet user, Internet service provider, online community host, or~~

~~1 other affected party on a written objection, motion to quash, or
2 motion for a protective order pursuant to this chapter shall be
3 entitled to recover attorney's fees and costs from the subpoenaing
4 party.~~

~~5 (l) Upon good cause shown and provided that the rights of
6 witnesses and consumers are preserved, a subpoenaing party shall
7 be entitled to obtain an order shortening the time for service of a
8 subpoena duces tecum or waiving the requirements of subdivision
9 (b), (c), or (d) where due diligence by the subpoenaing party has
10 been shown.~~

~~11 (m) Nothing contained in this section shall be construed to
12 apply to any subpoena duces tecum which does not request the
13 records of any particular consumer or consumers and which
14 requires a custodian of records to delete all information which
15 would in any way identify any consumer whose records are to be
16 produced.~~

~~17 (n) This section shall not apply to proceedings conducted under
18 Division 1 (commencing with Section 50), Division 4
19 (commencing with Section 3200), Division 4.5 (commencing with
20 Section 6100), or Division 4.7 (commencing with Section 6200)
21 of the Labor Code, or to a subpoena issued by or on behalf of a
22 licensee or owner of copyrighted work seeking the identity of an
23 individual pursuant to the Digital Millennium Copyright Act (P.L.
24 105-304).~~

~~25 (o) Failure to comply with this section shall be sufficient basis
26 for the witness to refuse to produce the personal records sought by
27 a subpoena duces tecum.~~

~~28 (p) In the case of an online subpoena, a consumer may bring a
29 civil action against the subpoenaing party in a court for damages
30 caused by the release of identifying information that, as a result of
31 the willful and intentional action of the subpoenaing party, fails to
32 comply with subdivisions (c) and (d). The court shall award the
33 following to the consumer:~~

~~34 (1) Actual attorney's fees and other litigation costs incurred.~~

~~35 (2) Actual damages, including economic loss.~~

~~36 (3) Statutory damages. Minimum statutory damages of five
37 thousand dollars (\$5,000) shall be imposed upon the subpoenaing
38 party for failure to comply with subdivisions (c) and (d).~~

~~39 (q) A consumer may bring a civil action against an Internet
40 service provider or online community host for actual damages and~~

~~actual attorneys' fees and other litigation costs incurred caused by a willful and intentional failure to provide notice or release of identifying information in violation of subdivision (d). The prevailing party in that action shall be awarded actual attorney's fees and costs.~~

~~(r) The rights and remedies provided in this section are nonexclusive and are in addition to all those rights and remedies that are otherwise available under any provision of law. failure to provide notice to the deposition officer or interactive computer service does not invalidate a motion to quash or modify the subpoena duces tecum or other motion, but may be raised by the deposition officer or an interactive computer service as an affirmative defense in any action for liability for improper release of records.~~

Any other consumer or nonparty whose personal records or online consumer information are sought by a subpoena duces tecum may, prior to the date of production, serve on the subpoenaing party, the witness, and the deposition officer or interactive computer service, a written objection that cites the specific grounds on which production of the personal records or online consumer information should be prohibited.

No witness, deposition officer, or interactive computer service may be required to produce personal records or online consumer information after receipt of notice that such a motion has been brought by any other consumer, or after receipt of a written objection from a nonparty consumer, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected.

The party requesting a consumer's personal records or online consumer information may bring a motion under Section 1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the personal records and the consumer or the consumer's attorney.

(k) When considering a written objection, motion to quash, motion for a protective order, or other motion to prohibit the disclosure of online consumer information in the case of an online subpoena, the court shall examine whether the subpoenaing party and the interactive computer service have substantially complied

1 *with the requirements set forth in this chapter, as well as all of the*
2 *following factors, as reflected in the pleadings as well as in the*
3 *evidence submitted by any party to the proceeding:*

4 *(1) The First Amendment rights of the anonymous speaker.*

5 *(2) The probability that the claimant will prevail on the merits.*

6 *(3) The necessity for disclosure of the online consumer*
7 *information.*

8 *If the court determines that these elements weigh in favor of the*
9 *consumer, the court shall quash the subpoena. A prevailing*
10 *consumer, interactive computer service, or other affected party on*
11 *a written objection, motion to quash, or motion for a protective*
12 *order pursuant to this chapter shall be entitled to recover*
13 *reasonable attorney's fees and costs from the subpoenaing party.*

14 *(l) Upon good cause shown, and provided that the rights of*
15 *witnesses and consumers are preserved, a subpoenaing party shall*
16 *be entitled to obtain an order shortening the time for service of a*
17 *subpoena duces tecum or waiving the requirements of subdivision*
18 *(b), (c), or (d), so long as due diligence by the subpoenaing party*
19 *has been shown. In the case of an online subpoena, if the consumer*
20 *whose online consumer information is sought is the defendant and*
21 *if a subpoenaing party is granted a temporary restraining order or*
22 *preliminary injunction to protect an intellectual property interest*
23 *on state law grounds, the notice provisions of subdivisions (c) and*
24 *(d) shall be waived, and, instead, the subpoenaing party shall*
25 *serve the notice of entry and temporary restraining order or*
26 *preliminary injunction on the interactive computer service*
27 *concurrent with the subpoena for online consumer information.*
28 *The declaration required under paragraph (3) of subdivision (c)*
29 *shall be served on the defendant concurrent with the notice of entry*
30 *and the temporary restraining order or preliminary injunction.*

31 *(m) Nothing contained in this section may be construed to*
32 *apply to any subpoena duces tecum that does not request the*
33 *records of any particular consumer or consumers, and that*
34 *requires a custodian of records to delete all information which*
35 *would in any way identify any consumer whose records are to be*
36 *produced.*

37 *(n) This section does not apply to any proceedings conducted*
38 *under Division 1 (commencing with Section 50), Division 4*
39 *(commencing with Section 3200), Division 4.5 (commencing with*

1 Section 6100), or Division 4.7 (commencing with Section 6200) of
2 the Labor Code.

3 (o) This section does not apply to online subpoenas issued
4 under Section 11180 of the Government Code or to a subpoena
5 issued by or on behalf of a licensee or owner of copyrighted work
6 seeking the identity of an individual pursuant to the Digital
7 Millennium Copyright Act (P.L. 105-304).

8 (p) Failure to comply with this section shall be sufficient basis
9 for a witness to refuse to produce the personal records sought by
10 a subpoena duces tecum.

11 (q) An interactive computer service is not liable to any person
12 for any claim based on any action or failure to act by the interactive
13 computer service in good faith compliance with this section.

14 (r) An interactive computer service is not liable to any person
15 for any claim based on either of the following:

16 (1) Any action or inaction of the subpoenaing party or
17 consumer.

18 (2) Any action taken by the interactive computer service as a
19 result of a failure by the subpoenaing party or consumer to fulfill
20 his or her obligations under this section.

21 (s) An interactive computer service is not liable for any claim
22 related to the service's violation of this section in a case in which
23 the service did not receive actual notice provided to its agent
24 designated under Section 1505 of the Corporations Code, of the
25 consumer's intention to file a motion to quash or modify the
26 subpoena or other motion limiting or staying the disclosure.

27 (t) In the case of an online subpoena, a consumer may bring a
28 civil action against an interactive computer service, for a violation
29 of this section, for actual damages caused by a willful and
30 intentional failure to provide notice or a willful or intentional
31 release of identifying information in violation of subdivision (d).
32 The prevailing party in that action shall be awarded reasonable
33 attorney's fees and costs.

34 (u) In the case of an online subpoena, a consumer may bring a
35 civil action against the subpoenaing party for damages caused by
36 the release of online consumer information that, as a result of the
37 willful and intentional action of the subpoenaing party, fails to
38 comply with subdivision (c) or (d), in which case the court shall
39 award the consumer all of the following:

40 (1) Reasonable attorney's fees and other litigation costs.

- 1 (2) *Actual damages, including economic loss.*
- 2 (3) *Statutory damages. Minimum statutory damages of five*
- 3 *thousand dollars (\$5,000) shall be imposed upon the subpoenaing*
- 4 *party for failure to comply with subdivision (c) or (d).*
- 5 (v) *The rights and remedies provided in this section are*
- 6 *nonexclusive and are in addition to all those rights and remedies*
- 7 *that are otherwise available under any provision of law.*

